LEGAL TENDER.

THE question whether Congress has the power to make paper a good tender in payment of debts, and the question whether under any given circumstances it is wise or right that Congress should use it, are very different things. He who asserts the power may well enough deny the wisdom, the justice, or the morality of any particular instance of its exercise; recalling what Sir Matthew Hale said of the king's prerogative regarding the coin: "It is true that the imbasing of money in point of allay hath not been very usually practised in England, and it would be a dishonor to the nation if it should . . . but surely if we respect the right of the thing, it is within the king's power to do it."[1] The topic which it is now proposed to consider is the purely legal one of constitutional power.

I. As regards the clauses of the Constitution relating to money, and as to the opinion of the framers of it about the emission of bills and making paper a legal tender.

The specifications of the power which is given to the Congress of the United States in the Constitution, relating to money, are two: power is given to borrow money and to coin money. Art. I., Sect. 8, clause 2, reads: [The Congress shall have power] "to borrow money on the credit of the United States." In clause 5 the power is given "to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures." Provisions corresponding to these are found in Art. 9, Sects. 4 and 5, of the Articles of Confederation; and the language there used accounts in part for that of the Constitution. The clauses above quoted originally stood, in Pinckney's Plan of a Federal Constitution,[2] as follows: "The Legislature of the United States shall have the power to borrow money and emit bills of credit; . . . to coin money, and regulate the value of all coins, and fix the standard of weights and measures." The Plan was referred to a committee. In the draft of the Constitution reported by the committee of detail[3] on August 6, after more than two months, the first clause stood nearly as before, while the other one read thus: "to coin money, to regulate the value of foreign coin."

[1] 1 Hale, P. C. 193. [2] 5 Elliott's Debates, 130. [3] *Ib.* 378.

There was now no difficulty in regard to the clause about coining money; it passed without opposition, taking on at some later stage the shape in which it now stands, namely, that which is first quoted above. As regards the other clause, that part of it was stricken out which authorized Congress to emit bills, and it was left thus: "to borrow money on the credit of the United States." In the articles of Confederation it had been: "to borrow money or emit bills on the credit of the United States;" and now, in the final result, they merely struck out, "or emit bills."

At no time did any plan or draft of the Constitution contain anything which in express terms touched the making of bills by Congress a legal tender; nothing was said for or against that power. That omission was not, of course, because the subject was unfamiliar; it was, in fact, very much brought to the attention of the framers of the Constitution, and so were all the possibilities of legislative action about it. It was suggested by Madison that this power of emitting bills of credit should not be struck out, but that the making of such bills a legal tender should be prohibited. It was suggested by others that if there were merely a striking out and no prohibition, the power both to emit bills and to make them a legal tender would exist in Congress. But still no prohibition was inserted, and there was simply a striking out of the express authority to emit bills.[1]

Now, as regards the States. In Pinckney's Plan, Art. XI.,[2] they were forbidden, "without the consent of the Legislature of the United States. . . . [to] emit bills of credit, [or] make anything but gold, silver, or copper a tender in payment of debts." By the report of the committee of detail[3] they were forbidden absolutely to coin money; and the previous prohibition, "without the consent of the Legislature of the United States," was continued as to the clause about emitting bills of credit, or making anything but specie a tender in payment of debts. This condition was afterwards stricken out,[4] and the whole provision on the subject as regards the States, finally took its present form of an absolute prohibition.[5]

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[1] *Ib.* 434. [2] *Ib.* 131. [3] *Ib.* 381. [4] *Ib.* 484, 485.

[5] Const. U. S., Art. I., Sect. 10, clause 1: "No State shall . . . coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." What was meant by emitting bills of credit was afterwards a matter of controversy in the courts. The definition of "bills of credit" by the Supreme Court (by the majority, per Marshall, C. J.) in Craig *v.* Mo., 4 Pet. 432 (1830), included any paper

As things stood, therefore, when the instrument was launched, and as they stand now; *first*, both the Union and the States could borrow money; *second*, the States could not coin money, and they could not give the quality of "a tender in payment of debts" to anything but gold and silver coin; *third*, the Union could "coin money, regulate the value thereof, and of foreign coin." It was not restricted as to the metal it should coin. It was not given any express power to give or to withhold from its own coin or any other, the quality of a legal tender in payment of debts; and it was not denied any usual or naturally implied power of this sort; *fourth*, the States could not emit bills, and, of course, they could not borrow by the aid of such bills; *fifth*, as to the power of Congress to emit bills, to supply a paper currency, or to make it a legal tender, the Constitution was silent.

The questions present themselves, Can Congress emit bills? Can it make them a legal tender? Can it make anything else a legal tender? In answer to the last of these questions, all agree that Congress can make coin a legal tender,—any coin. It is not restricted to its own coin; and it is not restricted to gold and silver. The power to do this is fairly, although not necessarily, implied in that of coining and regulating the value of coin. In view of the silence of the Constitution, the usual functions of coined money, and the usual powers of a government in regard to it, such a power cannot for a moment be doubted.

Can Congress emit bills and make them a legal tender? In considering the action of the Convention which framed the Constitution it is interesting to observe that this question presented itself, for the most part, not as a twofold question, but as a single one. The matter discussed was the emission of bills. Whatever this might mean, this was the dangerous thing. This was the power which it was proposed, in terms, to give, and this only; and this only is what was stricken out. If it should turn out that the power of emitting bills was not gone, by merely striking out the grant, then, of course, that act is not conclusive upon the question of giving them the legal tender quality. This power of making paper a legal tender may, indeed, be wanting for other reasons,

medium issued by a State for the purposes of common circulation. But this was afterwards restricted to bills issued by the State, and "containing a pledge of its credit." Briscoe *v.* Bk. of Ky., 11 Pet. 257 (1837); Darrington *v.* Alabama, 13 How. 12 (1851). This change saved the State banks.

but it is not wanting by reason merely of striking out the expression of a power to emit bills.

Let us see just what took place in the Convention as regards bills of credit, and what was then thought to be the effect of its action. What actually took place may be seen (so far as we have any report of it) by looking at pages 434 and 435 of the fifth volume of Elliott's Debates. The Convention was discussing, on August 16, the draft of a Constitution submitted ten days before by the Committee of Detail: —

Mr. GOUVERNEUR MORRIS moved to strike out "and emit bills on the credit of the United States." If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless.—Mr. BUTLER seconds the motion.—Mr. MADISON. Will it not be sufficient to prohibit the making them a *tender?* This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may in some emergencies be best.— Mr. GOUVERNEUR MORRIS. Striking out the words will leave room still for notes of a *responsible* minister, which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited. — Mr. GORHAM was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure. — Mr. MASON had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed, that the late war could not have been carried on, had such a prohibition existed. — Mr. GORHAM. The power, as far as it will be necessary or safe, is involved in that of borrowing.—Mr. MERCER was a friend to paper money, though, in the present state and temper of America, he should neither propose nor approve of such a measure. He was, consequently, opposed to a prohibition of it altogether. It will stamp suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens.—Mr. ELLSWORTH thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good.—Mr. RANDOLPH, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.—Mr. WILSON: It will have a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered;

and as long as it can be resorted to it will be a bar to other resources. — Mr. BUTLER remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power. — Mr. MASON was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed, on the other side, that there was none in which the government was restrained on this head. — Mr. READ thought the words, if not struck out, would be as alarming as the mark of the beast in Revelation. — Mr. LANGDON had rather reject the whole plan than retain the three words, "and emit bills."

Morris's motion to strike out was then carried by a vote of nine States to two. In a note at the bottom of page 435, in accounting for the vote of Virginia, Madison says: "This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that the striking out of the words would not disable the government from the use of public notes so far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts."

Now, in regard to that discussion, observe one or two points: *first*, that the objectionable thing was not merely making paper a legal tender, but having a paper currency at all. Madison's suggestion to insert a prohibition upon making bills a legal tender, was met by saying that all paper emissions must be prohibited; and Madison's note shows that he conceived that, in their final action, they were cutting away all pretext for a paper currency, and not merely for making it a legal tender; *second*, eleven persons only are reported as speaking in this discussion out of fifty-five, who, at one time or another, attended the Convention; [1] and most of those who spoke appear to have assumed that striking out the phrase "emit bills on the credit of the United States" was equivalent to prohibition.[2] But, although most of the members may have assumed this, all of them did not. One prominent and respected member, Mr. Gorham, from Massachusetts, distinctly made the point that, while he favored striking out, he would not consent to prohibition; he would strike out, because leaving the words in would be a standing temptation to use the power. Madison also tells us, in explaining his vote, that he thought there would still be some power

[1] 1 Ell. Deb. 125.

[2] And so Luther Martin, in his Address to the Legislature of Maryland, 1 Ell. Deb. 369, 370.

of using "public notes." Of these eleven speakers, five, viz.: Madison, Mason, Gorham, Mercer, and Randolph expressed themselves as not in favor of wholly prohibiting the emission of bills. And so, in accounting for the large vote in favor of Morris's motion, it is reasonable to suppose that a considerable number shared the opinion of Gorham, that striking out was not equivalent to prohibition. This sagacious policy of silence, rather than positive grant or positive prohibition, as regards the powers and duty of the Union, was resorted to on several occasions; they wished, as Gouverneur Morris is reported to have said of the instrument which they were preparing,[1] to "make it as palatable as possible." For example, on an unsuccessful motion to strike out a clause making the compensation of members of Congress payable out of the National treasury, Massachusetts voted to strike out; "not," says Madison, "because they thought the State treasury ought to be substituted, but because they thought nothing should be said on the subject, in which case it would silently devolve on the National Treasury to support the National Legislature." The members of the Convention were sensible that the Constitution, as Madison said, "had many obstacles to encounter," and they preferred sometimes to leave the instrument silent rather than to invite opposition by express provisions, either one way or the other.[2]

Such was the action of the framers of the Constitution as to the power to emit bills and the closely related topic of making them a legal tender. Turn now and consider that it is the established law of the country that Congress may emit bills. There is no doubt about that. It has been practised for seventy years and more; and Chief Justice Chase, in delivering the opinion of the Supreme Court of the United States, in Veazie Bank *v.* Fenno,[3] says: "It

[1] 4 Ell. Deb. 611.

[2] Compare the striking out of a clause empowering Congress to grant charters of incorporation, a power which, nevertheless, it has, 5 Ell. Deb. 543, 544; and Jefferson's comments, 4 *ib.* 610; and the note, *ib.* 611; and see Legal Tender Cases, 12 Wall. 559, per Bradley, J. Compare also the fate of Mr. Gerry's motion ("he was not seconded") to extend to Congress the prohibition which was put upon the States, as to impairing the obligation of contracts, 5 Ell. Deb. 546; see the remarks of Morris, *ib.* 485. Compare also the language of Madison, in his letter of Feb. 22, 1831, to C. J. Ingersoll; a certain evil which he is there discussing was not, he says, foreseen, "and, if it had been apprehended, it is questionable whether the Constitution of the United States (which had many obstacles to encounter) would have ventured to guard against it by an additional provision." 4 Ell. Deb. 608.

[3] 8 Wall. 533, at p. 548.

cannot be doubted that, under the Constitution, the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. "It is not important here," he adds, "to decide whether the quality of legal tender in payment of debts can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use, by those who see fit to use them, in all the transactions of commerce; to provide for their redemption; to make them a currency uniform in value and description, and convenient and useful for circulation. . . . Congress has undertaken to supply a currency for the entire country. . . . It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may properly be described as bills of credit. . . . Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. . . . Congress may restrain by suitable enactments the circulation as money of any notes not issued under its own authority." The two dissenting Judges do not deny the power of the government to emit bills of credit, but they speak of them as being "issued under a constructive power to issue bills of credit, as no express power is given in the Constitution."[1] And again, in the case of Hepburn *v.* Griswold,[2] Chase, C. J., says: "No one questions the general constitutionality . . . of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of preëxisting debts."

We are, therefore, to remark, that while the doctrine is now established that Congress may emit bills of credit, may furnish a paper currency, and may prohibit the circulation of any currency but its own, yet, in the debates of the Convention, so far as we know anything about them, the majority of the speakers thought that they were prohibiting bills of credit and paper money. They were wrong. They talked as if the striking out of the words "and emit bills on the credit of the United States" were prohibition;

[1] 8 Wall., at p. 555. [2] *Ib.* 603, at p. 619.

but it was not. Mr. Gorham's view is now the accepted one; the striking out was the removal of an express grant of power, but it was not a prohibition of the power. It had the effect to leave the question of power to be settled as it might arise, as in the instance of striking out the grant of power to grant charters of incorporations.[1] And so as regards the further question of the power to make the currency a legal tender, this act of striking out the words "and emit bills on the credit of the United States" was merely neutral. We have seen that most of those who took part in the debates of the Convention appear to have thought that if the power of emitting bills of credit should exist at all, the power to make them a legal tender would also exist if it were not expressly prohibited. Although Madison seems to have conceived that dropping the power to emit bills would not wholly deprive the Union of that power, while it would leave it destitute of the power to make its issues a tender, yet, as Mr. Justice Gray remarks,[2] "he has not explained why" he thought so. He also thought that there would be no power to issue them as a currency, or to establish any paper currency; which is not so. And he thought, too, that forbidding the issuing of bills of credit to the States was only forbidding such as are made a legal tender;[3] which was not so. "The Constitution itself," said Marshall, C. J., in Craig *v.* The State of Missouri,[4] furnishes no countenance to this distinction. The prohibition [in the case of the States] is general. It extends to all bills of credit, not to bills of a particular description."

II. But while it is true that no argument can be drawn from the action of the Convention in dealing with the power of Congress to emit bills of credit, against its power to give the quality of legal tender to its paper currency, yet it may, of course, be true for other reasons that Congress has no such power. This was strongly declared by Mr. Webster, in his speech on the "Specie Circular," delivered in the Senate of the United States on the 21st of December, 1836. The debate related to an order of the Secretary of the Treasury to certain officials to require the payment of gold and silver for public lands. Mr. Webster said:[5] "What is meant by the 'constitutional currency' about which so much is said? What

[1] See also the express proviso of Art. IV. Sect. 3, as to the Territories.

[2] 110 U. S. at p. 443.

[3] Letter to C. J. Ingersoll, Feb. 22, 1831, 4 Ell. Deb. 608.

[4] 4 Pet. 410, at p. 434.

[5] Webster's Works, IV. 270, 271.

species or forms of currency does the Constitution allow, and what does it forbid? It is plain enough that this depends on what we understand by *currency*. Currency, in a large, and, perhaps, in a just sense, includes not only gold, and silver, and bank notes, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But if we understand by currency the *legal money* of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender, in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints, or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender, in payment of debts, and although no such express prohibition is applied to Congress, yet as Congress has no power granted to it, in this respect, but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts. Congress has exercised this power, fully, in both its branches. It has coined money, and still coins it. It has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established, and cannot be overthrown. To overthrow it, would shake the whole system. But, if the Constitution knows only gold and silver as a legal tender, does it follow that the Constitution cannot tolerate the voluntary circulation of bank notes, convertible into gold and silver at the will of the holder, as part of the actual money of the country? Is a man not only to be entitled to demand gold and silver for every debt, but is he, or should he be, obliged to demand it in all cases? Is it, or should government make it, unlawful to receive pay in anything else? Such a notion is too absurd to be seriously treated. The constitutional *tender* is the thing to be preserved, and it ought to be preserved sacredly, under all circumstances. The rest remains for judicious legislation by those who have competent authority."

That is a very emphatic expression of opinion on the part of Mr. Webster, and it is often cited. He puts this doctrine as

resulting from the fact that Congress, while not expressly prohibited, like the States, yet has no grant of power "in this respect, but to coin money and regulate the value of foreign coins."[1] If this ground be thought, as I venture to think it, not a very strong one, it must be remembered that Mr. Webster was not, just then, concerned in any careful or affirmative discussion of this topic; he was only making a passing concession to his opponents. His line of thought was this: "You talk of 'paper money' as unconstitutional; and of gold and silver as the only 'constitutional currency.' What is meant by 'constitutional currency?' If you mean that nothing but coin can be a legal tender, I agree; but if you mean that it is not constitutional to have a paper currency at all, I deny it." That is to say, he conceded a point, in passing, without at all undertaking to weigh carefully his language or his reasons as regards a matter upon which he assumes that all whom he is addressing think alike. Still he does give a reason; (*a*) there can be no legal tender but coin, as resulting from the action of a State, because the States are expressly prohibited from making anything but gold and silver a tender in payment of debts; (*b*) there can be no legal tender but coin resulting from the action of Congress, because, though not expressly prohibited, "as Congress has no power granted to it in this respect, but to coin money and regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts."

Now, as regards these statements of Mr. Webster, there is, in the first place, no difficulty in assenting to what he says about the power of the States. But as regards Congress, his conclusion is by no means so obvious. When it is said that Congress has no other power granted to it, in respect to legal tender, than that which is mentioned, if it is meant that no such power is granted by implication elsewhere, there is a begging of the question which we are discussing, and of which more will be said later on. If it is meant that there is no other express grant of the power, the statement is objectionable in its assumption that there is here any express grant of power to establish a legal tender; although it is to be admitted that there is not any express grant of it elsewhere.

[1] Mr. Webster is, of course, a little inaccurate here. Congress may also "regulate the value" of its own coin. And it is an error to say that Congress can make only gold and silver a tender.

The argument as regards this last point, which Mr. Webster's expressions suggest, has been forcibly put by Mr. Holmes (now Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts), thus: "It is hard to see how a limited power, which is expressly given, and which does not come up to a desired height, can be enlarged as an incident to some other express power; an express grant seems to exclude implications; the power to coin money means to strike off metallic medals (coins) and to make those medals legal tender (money). If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?" [1] In another place [2] Mr. Holmes again uses this argument and declares it to be, in his opinion, unanswerable. Mr. Justice Field, in the Legal Tender Cases [3] presses the same reasoning, in his dissenting opinion, and adds: "When the Constitution says that Congress shall have the power to make metallic coins legal tender, it declares in effect that it shall make nothing else such tender." To which Mr. Holmes adds, "We should prefer to say, it excludes the implication of a grant of more extensive powers."

This reasoning seems to me obviously defective.

(1.) It does not take the language of the Constitution as it stands. It puts a construction on it, viz.: that money and legal tender are here synonymous; and reasons as if this part of the Constitution contained the expression "legal tender." The Constitution does not, in terms, say that Congress may make coin a legal tender, although, truly, the power is not wanting; but it says nothing about legal tender. The argument, then, that the express grant of power to make coin a tender excludes the implication of a power to make anything else a tender, is inapplicable to the actual text of the Constitution.

(2.) This construction appears to be wrong. The Constitution, in the coinage clause, simply confers on Congress one of the usual functions of a government, that of manufacturing metallic money and regulating the value of such money. As to what shall be done with it when it is manufactured and its value regulated, the Constitution says nothing. I cannot doubt that the

[1] In 1 Kent's Com. (12 Ed.) 254 (1873); and also, before that, in 4 Am. Law Rev. 768 (July, 1870).

[2] 7 Am. Law Rev. 147 (1872).

[3] 12 Wall. 651 (Dec. 1870).

word *money* in the coinage clause is limited to metallic money.[1] And Congress may do with it and about it, and may abstain wholly or in part from doing, what is ordinarily done by governments when they coin money; and so may make it a legal tender. But money is not necessarily a tender in discharge of contracts or debts; with us, foreign money is not;[2] some domestic money is not; for example, trade dollars,[3] silver coins, under the denomination of one dollar, for amounts over ten dollars,[4] copper and other minor coins, for amounts over twenty-five cents.[5] Undoubtedly the Legislature may make its coin a legal tender or not, as it pleases, and to such a partial extent, and with such qualifications as it pleases. In law, whatever is legal tender is money; but it is not true that whatever is money is legal tender. The clause of the Constitution, therefore, which provides for the coinage of money is not one which, by any necessary construction, says anything about legal tender. While, indeed, it is clear, having regard to the nature and ordinary use of coined money, to the ordinary powers of governments, to the control over this whole subject which is given to Congress by the Constitution, and to its silence as touching any restrictions regarding the power to make the money, when coined, a legal tender, — that Congress has full power to give or withhold this quality as regards its coined money, yet this power is inferential, and not express. The real argument, then, from the clauses relied upon by the learned persons above quoted, is not, as it is put; (*a*) Congress has an express power to make coin a legal tender; and so, (*b*) an implied power to make something else a legal tender is excluded. But it cannot be put higher than this: (*a*) Congress has an express power to coin money; (*b*) in that, is implied a power to make it a legal tender; and (*c*) this implied power excludes an implied power to make anything else a legal tender. That argument is not a strong one.

The power of Congress to make and put in circulation a paper currency, a paper medium of exchange, what Mr. Webster, in common with Adam Smith and Hamilton, and many another, calls "paper money," is now established. The express power to coin money does not exclude the implication of that. Why, then,

[1] But see Mr. McMurtrie's very able "Observations on Mr. George Bancroft's Plea for the Constitution."

[2] U. S. Rev. St. Sect. 3584.

[3] 1 Suppl. Rev. St. p. 254.

[4] *Ib.* p. 488.

[5] U. S. Rev. St. Sect. 3587.

should the implied power of making coined money a legal tender exclude an implied power of making "paper money" a legal tender? As the power to coin money, and so to furnish a medium of exchange does not exclude an implied power to furnish another medium of exchange, a paper currency, "paper money," — so neither in its expression nor its implication does it exclude the implied power to make this other medium of exchange a legal tender.

But it may be thought that I have gone too far in saying, as regards metallic money, that the terms *money* and *legal tender* are not convertible terms. It is not forgotten that distinguished persons have held the contrary opinion. Mill has said: "It seems to me to be an essential part of the idea of money that it be legal tender."[1] A distinguished French writer, Say, has remarked: "The copper coin and that of base metal are not, strictly speaking, money; for debts cannot be legally tendered in this coin, except such fractional sums as are too minute to be paid in gold or silver."[2] Many other persons have held this as a doctrine of political economy, although it is a view which is by no means universally accepted.[3] In law, also, it is to be admitted that, generally, in the payment of debts and obligations, and on the side of penal law, as in a statute relating to the embezzlement of money, only what is a legal tender is money.[4] But it must also be remembered that the Constitution, in giving to Congress the power to coin money, is not, just then, concerned with the technicalities of law or political economy; it is disposing of one of the "*jura majestatis*" in brief and general terms, in phrases which are the language of statesmen. The terms used in this place import the manufacture of metallic coin, and do not comprehend the preparation of paper. But to say that they import no other metallic coin than that which is made a legal tender seems to be clearly an error. Even in strict law the term *money* sometimes covers things other than legal tender, as in the case of a gift of "money" in a will, which includes bank notes.[5] Of bank notes, also, Lord Mansfield said, in 1758, in Miller *v.* Race,[6] in an action of trover

[1] Principles of Pol. Econ. Book III. c. XII., s. 6.

[2] Pol. Econ. Book I. c. XXI., s. 10.

[3] See especially Francis A. Walker's acute and searching book on "Money."

[4] 2 Bish. Crim. Law, s. 357, Title Embezzlement, "Money means, as a general proposition, what is legal tender, and nothing else."

[5] 2 Williams Ex., Pt. 3, Book 3, c. II. s. 4. [6] 1 Burr, 457.

for a bank-note: "They . . . are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind. . . . They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Of the guinea, first coined in 1664 and not made a legal tender till 1717, Holt, C. J., said, in 1694, in St. Leiger *v.* Pope:[1] "Do you think that it is not high-treason to counterfeit guineas? A guinea is the current coin of the kingdom, and we are to take notice of it." And then, above all, consider the usage of the time when the Constitution was made. Adam Smith, of whose great work on "The Wealth of Nations," the first edition was published in 1776, and the last, of those during his lifetime, in 1786, remarks: "Originally, in all countries, I believe, a legal tender of payment could be made only in the coin of that metal which was peculiarly considered as the standard or measure of value. In England, gold was not considered as a legal tender for a long time after it was coined into money."[2] I am not concerned with the precise accuracy of this statement in certain points of fact,[3] but only with its use of terms. Dr. Johnson, whose dictionary received his last corrections in the edition of 1773, defined money, with no reference to the idea of tender, simply and only as "metal, coined for the purposes of commerce." Hamilton, in 1790, in his opinion given to Washington, on the constitutionality of the bill to incorporate a United States Bank,[4] said: "The Bank will be conducive to the creation of a medium of exchange between the States. . . . Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose of money with different degrees of utility. Paper has been extensively employed."[5]

Observe, also, the sense of the term as used in our early statutes. In the first Coinage Act, of April 2, 1792,[6] in Sect. 9, ten coins, from eagles down to cents and half cents, are directed to be struck at the mint, and the value of them is regulated. Here appears to be the full exercise of the express power given in the Constitution,

[1] 5 Mod. at p. 7. [2] Book I. c. 5.

[3] See Coins of the Realm, by the Earl of Liverpool, 143.

[4] Lodge's Works of Alexander Hamilton, III. 213.

[5] It is needless to say that Hamilton was not here advocating making the paper a legal tender.

[6] 1 U. S. St. at Large, 246.

"to coin money and regulate the value thereof;" and it will be remarked that it is exercised in regard to the copper coins no less than the gold and silver ones. In a later section (Sect. 16) the gold and silver coins, and these only, are made "a lawful tender in all payments whatsoever." But can there be any doubt that the two copper coins were regarded as "money"? If so, the doubt will vanish on looking at the Act of May 8, 1792, to "provide for a copper coinage,"[1] which, in furtherance of the previous Act, provided, among other things, that the cents and half-cents were to be paid into the treasury, "thence to issue into circulation," and that after a fixed time "no copper coins or pieces whatsoever, except the said cents and half-cents, shall pass current as money," and also enacted forfeiture and a penalty for paying or offering any other copper coins but these; but it said nothing of their being a tender. It was, I believe, more then seventy years before copper coin had the quality of legal tender.[2] As regards our later legislation, in the Revised Statutes of the United States (Sect. 3513), the trade dollar is classed among "the silver coins of the United States"; and in Sec. 3586 it is, with the rest, made a legal tender for amounts not over five dollars. By a statute of 1876,[3] the quality of legal tender is taken away from this "silver coin of the United States." Does it thereby cease to be money? The case of the trade dollar is peculiar. But imagine the government to coin some very large gold piece for supposed reasons of convenience in trade, without making it a legal tender; this, as I am told, was formerly done in Germany; is such a coin, therefore, not money? Suppose the government, for like reasons, to manufacture coins, of exactly the same size and value as those of England, or Russia, or Holland, not a legal tender, but supposed to be serviceable in foreign trade, would they not be money? Suppose such coins to be made for use in China as being readily taken there, would the case be essentially different? And, finally, suppose that Congress, instead of repealing that part only of Title 39 of the Revised Statutes which related to the trade dollar had repealed all of it; it is the seven sections of this title, under the separate heading of

[1] 1 U.S. St. at Large, 283.

[2] Upton's Money in Politics, 259. Can there (to adopt the suggestion of a learned friend) be any doubt, if a State should issue a copper coinage like this, that the proceedings would be unconstitutional, as coining money?

[3] 1 Suppl. R. S. U.S. 254.

"Legal Tender," which give that quality to the coins of the United States; would all our coins, manufactured as they are under the provisions of the separate Title 38, cease to be money? It seems clear that they would not; and we must conclude that the term money, as used in the coinage clause of the Constitution, has that large and universal sense in which it is used in the reasonings of Aristotle,[1] of Adam Smith, and of Hamilton, viz.: that of a common metallic medium of exchange, "the common measure of all commerce."[2]

And, finally, before leaving this argument from the supposed express power in the coinage clause, it may be added, as was said before, that this argument would equally apply if the Constitution had retained the express clause giving power "to emit bills on the credit of the United States." It might still have been said that the implication of a power to give these bills the quality of legal tender was excluded by the coinage change. Yet the evident understanding of most of those who took part in the debates was, that if the power to emit bills was given it would carry with it the power to make them a tender, unless that power was expressly prohibited. There can be no doubt as to their understanding of that. The coinage change was not even alluded to. We have, then, in a way, the authority of these framers of the Constitution against the argument that the coinage clause excluded the implication of a power to make paper a legal tender.

III. But there are other grounds on which the power now in question is denied. It is said that it is not necessary and proper to the end of carrying out any express power given to Congress, and that it is inconsistent with the letter and spirit of the Constitution. Of these arguments an article in the "American Law Review,"[3] understood to have been written by Mr. Holmes, whose general contention they are put forward to support, has expressed a slighting opinion. "The case of Hepburn *v.* Griswold," he says, "(8 Wall., 603), was argued very much on the question whether the Legal Tender Act was a necessary and proper means of carrying out some of the powers expressly given to Con-

[1] Nicom. Eth. Bk. V. 5. "For this purpose money was invented, and serves as a medium (*μέσον*, mean, or means) of exchange, for by it we can measure everything. . . . Money is, indeed, subject to the same conditions as other things; its value is not always the same, but still it tends to be more constant than anything else," etc. Translation by F. H. Peters. London, 1881.

[2] 1 Hale's P. C. 184.

[3] Vol. VII. p. 146.

gress . . . and the case presented the curious spectacle of the Supreme Court reversing the determination of Congress on a point of political economy." And, after referring to the later decision, in 12 Wall., 457, and expressing the opinion already referred to, that the argument drawn from the coinage clause is unanswerable to show that there is no power to make paper a legal tender, it is added: "Judges Strong and Bradley are more successful, to our mind, in meeting the shadowy argument drawn from the spirit of the Constitution as to impairing the obligations of contract, etc., than in overthrowing this. Less attention is given than in Hepburn *v.* Griswold to the fitness of the legal tender acts to accomplish their ends, which we must think a purely legislative question, in the absence of an obvious fraud on the Constitution."

This view of the arguments alluded to appears to be a sound one. It is said to be inconsistent with the spirit of the Constitution to make paper a legal tender because it is unjust; and it is pointed out that a great and avowed purpose of the Constitution was the establishment of justice.[1] That is an argument which has often been repeated, but it is of very slight importance. I do not mean that it is of slight importance to do an unjust thing; that is never a matter of small importance. But we are considering the value of arguments, and of arguments for the judicial setting aside of legislation; and I mean that this argument, as one justifying the declaration that a legislative act is void, is a slight one. The preamble of the Constitution in saying that its purpose is "to establish justice," etc., is making a large preliminary declaration relating to the total aim of the instrument as a whole. If the question were about legislation reducing the duty on wool, and it should be argued in a judicial opinion that the law is contrary to the spirit of the Constitution, because it is the aim of that instrument "to form a more perfect union," while this law is necessarily unsatisfactory to the people of a certain section of the Union, and tends to alienate them from it,— that kind of reasoning would be instantly felt to be out of place. It seems, at best, to belong to legislative, rather than judicial discussion. An answer to this sort of argument may be collected from an important early case,[2] which held that Congress might constitutionally give the govern-

[1] 8 Wall., 622, per Chase, C. J.

[2] U. S. *v.* Fisher, 2 Cranch, 358 (1804).

ment priority over other creditors; and, therefore, that a law could not be held void which provided that where any revenue officer, or other person, should hereafter become indebted to the United States, and then insolvent, the debt due to the United States should be satisfied first, without limiting this postponement of private creditors to the case of such as should become creditors after the passage of the law. Mr. Justice Washington described this law, if interpreted as the Court did interpret and sustain it,[1] as "productive of the most cruel injustice to individuals," and tending "to destroy, more than any other act I can imagine, all confidence between man and man." He himself found it possible to interpret the law as applying only to persons accountable to the government, and so as not applicable to this case; and he therefore dissented from the opinion of the Court. But he admitted the power of Congress to go further if it saw fit: "The sovereign may in the exercise of his powers secure to himself this exclusive privilege of being preferred to the citizens; but this is no evidence that the claim is sanctioned by the claims of immutable justice. If the right is asserted individuals must submit," etc. And the Court (Marshall, C. J.), interpreting it to cover all debts, said: "The power is not prohibited. But it is said, and it is true, it must appear to be granted. It is so under the power to make all laws necessary and proper to carry into execution the powers vested. It need not be indispensable; Congress may use any means which are, in fact, conducive to the exercise of any powers granted by the Constitution. It has the power to pay the debts of the Union, and it must be authorized to use the means which appear to itself most eligible to effect that object."

But, again, apart from the phrases of the preamble of the Constitution, it is said that the spirit of the Constitution as regards contracts is shown by the contemporaneous provisions which were made by the Congress of the Confederation sitting at the time of the convention, in framing the ordinance for the North-western Territory,[2] viz., that no law should be passed there which interfered with private contracts, and also by the provisions of the Constitution prohibiting States from impairing the obligations of contracts. And so the Court (Chase, C. J.) says: "A law not made in pur-

[1] U. S. *v.* Fisher, 2 Cranch, p. 402.

[2] Chase, C. J., in Hepburn *v.* Griswold, 8 Wall. 622.

suance of an express power, for example, to pass bankruptcy laws which necessarily and by its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." Like arguments are drawn from the fifth amendment, prohibiting the taking of private property for public purposes without compensation, and the taking of property without due process of law. Indeed, this last provision is regarded as "a direct prohibition" of the legislation now in question; and so the reasoning, as regards this clause, is, that the legal-tender legislation is contrary not merely to the spirit of the Constitution, but to the letter of it.

This argument discriminates between laws made in pursuance of express powers and others. Why is this? If the argument is not good as regards express powers, which appears to be conceded, why should it be good as regards those that are implied or auxiliary? If the implied power be otherwise plain it is difficult to see why it should be treated any differently as regards the exercise of it, or its relation to the spirit of the Constitution, from any other power. As regards the existence of any alleged power, whether a main or auxiliary one, whether express, implied, constructive, inferential, or what not, the same questions are to be asked, viz.: Is it, upon the fair construction of the instrument, given? If it is given, how far, if at all, is it qualified? [1] In the preference case,[2] the Court saw no sufficient reason for denying the existence of an implied power on the ground of injustice in the exercise of it, as impairing the obligation of contracts or taking away private property without compensation or due process of law; although the direct and inevitable operation of the law was to deprive the debtor of the ability to pay a part of his debts, and so to deprive the creditor of his property. As regards the legal-tender law, it is not true, in any other sense than it was true in Fisher's case, that there is the direct and inevitable injury spoken of by the Chief-Justice in Hepburn *v.* Griswold.[3] If the notes are convertible and sufficiently secured, the legal-tender quality need not produce injury; that is the case to-day with our legal-tender notes; there is no direct and inevitable injury.

IV. Leaving now the special consideration of arguments against the power in question, it is time to give, affirmatively, the reasons

[1] Juilliard *v.* Greenman, 110 U. S., at p. 448; Legal Tender Cases, 12 Wall., at p. 550 per Strong, J.

[2] U.S. *v.* Fisher, 2 Cranch, 358. [3] 8 Wall., at p. 623.

for believing that making the notes of the Government a legal tender for debts may fairly be held necessary and proper for the exercise of some of the powers granted in the Constitution.[1]

1. This power is really involved in the power of issuing or authorizing a paper currency. That power may be derived from the power to regulate commerce, as Hamilton seems to have derived it, in urging upon Washington the signing of the Bank Act, at the outset of the government.[2] "The bank," he says, "will be conducive to the creation of a medium of exchange between the States and the keeping up of a full circulation. . . . . Money is the very hinge on which commerce turns." And he adds that the whole or the greatest part of the coin in the country may be carried out of it. Years before[3] Hamilton had condemned as visionary the notion that coin was adequate to the purposes of currency. This power of providing a paper currency is variously accounted for. In the Veazie Bank case,[4] the Court, while declaring it, did not state where it was found. Webster derived it from

[1] It is not necessary to emphasize the point in regard to this question, but it is worth remarking, as we pass, that courts, in declining to pronounce a legislative act unconstitutional, are not, in reality, required to hold any distinct, affirmative opinion that the measure is constitutional. They are engaged in revising the action of another department of the government, and their duty is indicated in Cooley's phrase: "To be in doubt, therefore, is to be resolved, and the resolution must support the law." (Princ. Const. Law, 153.) It is still more plainly indicated by such a statement as that of Mr. Justice Thomas (Opinion of the Justices, 8 Gray, p. 21) when he sustains the constitutionality of an act of the legislature "upon the single ground that the act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void." It is not a difficult inference from these expressions that the judge's own opinion was, that this act was, in fact, not warranted by the Constitution. To the like effect is the very common expression of the judges that, in order to justify the judicial declaration that legislation is unconstitutional, the fact must be plain "beyond a reasonable doubt." Ogden *v.* Saunders, 12 Wheat., at p. 270, per Washington, J.; Sinking Fund Cases, 99 U. S., at p. 718, per Waite, C.J.; Wellington, Pet'r., 16 Pick., at p. 95, per Shaw, C.J.; People *v.* Sup. of Orange, 17 N. Y., at p. 241, per Harris, J.; Cooley Const. Lim. 183. See Von Holst Const. Law of U.S. 64, 65 (Chicago, 1887). The remark that the Constitution is a law, and, therefore, can have but one allowable interpretation, and that one the interpretation given to it by the Court, overlooks the essential peculiarity of that form of law which we call a Constitution. See a letter to the *Nation* of April 10, 1884, in which the present writer has enlarged upon this topic. One must not, to be sure, emphasize too heavily a single expression, like this of a "reasonable doubt." But an analysis of the reasons for the general principles adopted by Courts in passing upon the constitutionality of legislation will be found to lead to very important conclusions; and these are well intimated by that expression and its connotation in other parts of the law.

[2] Lodge's Works of Hamilton, III. 213.

[3] In 1781, Letter to R. Morris, *Ib.* 102.

[4] 8 Wall. 533.

the coinage clauses of the Constitution, including the prohibition on the States.[1] Webster also found it in the power to regulate commerce.[2] Chase, C. J., in 12 Wall. 574, 575, puts the power to emit bills on the borrowing clause, and the power to regulate commerce; and as to the power to exclude from circulation all but government notes, he says that it "might perhaps be deduced from the power to regulate the value of coin"; and that "this was the doctrine of the Veazie Bank *v.* Fenno, although not fully elaborated in that case."

Now, in furnishing the currency, what may the government do with it? Why may it not, as a question of legal power, make it do the full and usual office of money; that is, make the tender of it the legal equivalent of a tender of metallic money? If, as we see reason to believe, this was not prohibited, and not inconsistent with any provisions of the Constitution; and if, at the same time, it was a power which had been frequently exercised by those legislative bodies with which the framers of the instrument were most familiar, and was generally deemed by them to go along with that power of furnishing a paper currency, which they did confer upon Congress; if, like the power of conferring upon coin the legal-tender quality, it be a power which naturally, and according to the usage of nations, is included in that complete

[1] "The exclusive power of regulating the metallic currency of the country would seem necessarily to imply, or, more properly, to include, as part of itself, a power to decide how far that currency should be exclusive, how far any substitute should interfere with it, and what that substitute should be."— Works, III. 395. "Let me ask whether Congress, if it had not the power of coining money, and of regulating the value of foreign coins, could create a bank, with the power to circulate bills. For one, I think it would be difficult to make that out." *Ib.* 413. See Legal Tender Cases, 12 Wall., at p. 545, per Strong, J. Also "Observations on Mr. George Bancroft's Plea for the Constitution," by Richard C. McMurtrie (Philadelphia, 1886), pp. 16-24.

[2] "It is clear that the power to regulate commerce between the States carries with it, not impliedly, but necessarily and directly, a full power of regulating the essential element of commerce, namely, the currency of the country, the money, which constitutes the life and soul of commerce. We live in an age when paper money is an essential element in all trade between the States; its use is inseparably connected with all commercial transactions. . . . . I understand there are gentlemen who are opposed to all paper money, who would have no circulating medium whatever but gold and silver. . . . . I would ask this plain question. Whether any one imagines that all the duty of government in respect to currency, is comprised in merely taking care that the gold and silver coin be not debased? . . . . If government is bound to regulate commerce and trade, and, consequently, to exercise oversight and care over that which is the essential element of all transactions of commerce, then government has done nothing, etc." Works, IV. 315, 316.

control over money and the currency which is given to Congress, then it cannot well be denied to our national government. Such legislation may or may not be highly objectionable. It may in a perilous time be useful, and even necessary, to the proper discharge of the duty of a government. Or it may in ordinary times be very immoral and even outrageous legislation. But it is not for a Court to act as the keeper of the legislative judgment or the legislative conscience on a legislative question. When, in the early part of the war that was carried on here twenty odd years ago, the State banks broke down, it was thought by Congress highly important, if not absolutely necessary, that the government should furnish a currency to the country; commerce could not go on without it; there was not coin enough to do the business of the country. The emission of government bills of credit was a natural and suitable method, not merely of doing other things, but of supplying a currency. And in the straits to which we were then reduced, the credit of the government being gravely in doubt, foreign nations expecting our downfall, and our own people fearful of the result, even the government promises could not command confidence.[1] At such a time a currency resting only on the government credit would not, it was thought, do the office of a medium of exchange, or would not do it reasonably well, without giving it the full, usual and legal quality of money; with that quality it served the purpose. If it be said, as it has been said, that it would have served the purpose as well, or better, if to each note had been annexed the right to ride in every railway car in the country, to enter places of public amusement and the like, the answer is, that it is true that such privileges would have helped; but these incidents would have been foreign to the purposes of a currency. To make the currency do the usual office of money more effectually and fully, is legitimate regulation of the currency. To make it do the special office of theatre tickets or railroad tickets is superadding to its quality as currency, as money, or its equivalent, another and foreign quality.

2. Congress, having the power to furnish a paper currency, and to give to that currency such qualities as may make it do the full and usual office of money, may use its own currency, in any of its forms, in order to borrow money. And, in combining these

[1] Miller, J., in Hepburn *v.* Griswold, 8 Wall., at p. 632; Strong, J. (for the Court), in Legal Tender Cases, 12 Wall., at p. 540.

functions of issuing a currency and borrowing money, if Congress give to its currency the quality of legal tender, wholly or mainly, because it will thus be a better instrument for borrowing purposes, it will not be in the power of a court to declare the legislation for that reason unconstitutional.

It will be convenient here to make a few discriminations. In order to supply a paper currency the government need not emit bills; it may charter a private bank to provide a circulation, and may simply regulate its operations; and it may be itself a stockholder, as in the case of the United States Bank. Or it may avail itself of banks already established. In such cases there is no borrowing of money. On the continent of Europe, as I am informed, most of the cases where governments made the paper currency a legal tender, before the time of our Constitution, — and, some of the instances, since, but not all, — were those of giving this quality to the paper of private or *quasi* public institutions; not to government bills. Now, in such cases, the government does not necessarily borrow money. Again, even where it makes its own paper a currency, and a legal-tender currency, it does not necessarily raise money on it, except, of course, in so far as it may go on to pay its debts with it, and thus borrow by a forced loan; for it may, as the States sometimes did,[1] cause its paper to be given out by lending it on the security of other property. Or it may issue it to banks on their giving security for its redemption, and merely allow them to use it and issue it as a circulating medium. In such a case there is no borrowing by the government.

The case of the present National banks is not quite this; for they take notes furnished by the government and issue them as their own, and are fully and primarily responsible upon them; but the government is a sort of guarantor, and holds specific property of the banks, viz. government bonds, as security, to be applied to the redemption of the notes, being itself bound to redeem them on the failure of the banks to do so, and having the right to apply the bonds to reimburse itself. Now, there is here a remote element of borrowing; that is to say, the property of the banks which must be deposited consists of the securities of the United States; and, in order to get those securities, the banks, or somebody else, must have lent money to the United States. So that, under the existing

[1] Craig *v.* Mo., 4 Pet. 410.

system, the United States says: (1) there shall be a currency for the whole country; (2) it shall be furnished by the United States and guaranteed by it, but issued through private banks; (3) in receiving these printed notes the banks shall leave as security with the United States a certain quantity of bonds of the United States which are their own property; (4) they must return these notes to the United States before they can have their bonds again. This, of course, is uniting the operation of the two powers of borrowing and of issuing a currency. If the government, instead of this arrangement, were to issue its own currency directly, like the greenbacks, it need not necessarily borrow with it; for it might, as we have seen, lend it on security (which might or might not be its own bonds), to be used by others.

But, on the other hand, it may borrow money with it; and that is the natural and obvious way of giving out its currency. That was, in point of fact, done during our great rebellion. If this currency be one which is the full legal equivalent of money, a legal tender, the principle is still the same; the government may borrow with this currency as well as any other. When the government notes consist of promises to pay, the phrase of borrowing is, of course, strictly applicable. It is true we more commonly speak of this operation as that of the government selling its bonds or notes, as we speak of a man selling his own promissory notes. But it is, in fact, borrowing money on a promise to pay; and in the case of the government it is borrowing upon a kind of promise to pay, which is a part of the medium of exchange, and of that which is, in the full legal sense, money.

We perceive, then, a great difference between private borrowing and public borrowing.[1] When a nation borrows it may, as we see, borrow with its currency; and if its currency be made a legal tender it may borrow with that. I do not say, if a government were denied the power of establishing a paper currency at all, that it could give to its paper the quality of legal tender in order to borrow with it. To do that would, indeed, help the borrowing process; but, on the supposition I am now making, viz., of a government with no power to establish a paper currency, it would be an evasion of the restriction put upon it, to say that it could, merely for facility of borrowing, annex to its security a quality which would be forbidden if it were not borrowing. It is not, then,

[1] And so Juilliard *v.* Greenman, 110 U. S. at p. 448, per Gray, J.

as part of the mere, bare, simple process of borrowing that Congress is to be said to have the power of giving to the government paper the quality of money. But it is as part of the borrowing power *of a nation;*[1] of a body which has other governmental powers, such as the power of establishing a paper currency, and so of annexing to it the legal-tender quality; the power and duty of raising armies and providing for their support, and so of raising money suddenly and in vast quantities; and the like. Such a body may borrow with its currency and with its legal-tender currency.

If there be any exigency, as, for example, that of war, in which the government may make its own notes, or any other, a legal tender, it seeems to be purely a legislative question when such an exigency has in point of fact arisen. This was the unanimous opinion of the Court in Juilliard *v.* Greenman.

James B. Thayer.

[1] Juilliard *v.* Greenman, 110 U.S. 421, 444–448. The pamphlet of Mr. Bancroft, called out by this case, proceeded upon singular misconceptions, and was unworthy of its author's fame.